FEB 22 1993

LANL

Department of Energy
Field Office, Albuquerque
Los Alamos Area Office
Los Alamos, New Mexico 87544

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D. Bruce Jones, Esq.
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Multi-Media Section
Environmental Protection Agency, Region 6
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Dallas, TX 75202-2733

Re: Draft Federal Facilities Compliance Agreement (FFCA) Regarding Land Disposal Requirements at the Los Alamos National Laboratory (LANL)

Dear Bruce:

This letter confirms our telephone conversation regarding the position of the Department of Energy (DOE) on the Dispute Resolution and the Stipulated Penalties sections of the captioned draft FFCA as proposed in your letter to me of December 23, 1992.

We have incorporated all the other revisions you proposed for the terms and conditions, although we would like to discuss a couple of them to be sure we understand them. Our technical staff has been discussing the two proposed revisions to the Compliance Plan with Nick Stone. As soon as they have agreed on an approach, we will make a formal counterproposal to your proposed language.

In addition, as suggested in your letter, DOE would like to reach agreement on language to be incorporated into the FFCA describing the fate of the FFCA when DOE is required to enter into a similar agreement with the State of New Mexico pursuant to the Federal Facilities Compliance Act (the Act).

On the issue of penalties, DOE's position is that it is not appropriate to include penalties in the FFCA. Prior to the passage of the Act, the Department of Justice (Justice) had always taken a strong position that there was no waiver of federal governmental sovereign immunity for fines and penalties under the Solid Waste Disposal Act. This position was based on the ground that a waiver of sovereign immunity must be expressed clearly and unequivocally and there was no clear and unequivocal expression of a waiver in the Solid Waste Disposal Act. Since passage of the Act, the DOE Office of General Counsel (OGC) has been discussing with Justice how the Act has affected this position. In part, these discussions have focused on whether there is a waiver of sovereign immunity with regard to fines and penalties resulting from a failure to comply with the terms of agreements which are entered into between the Environmental

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Protection Agency (EPA) and another federal agency after the effective date of the Act and which address mixed waste compliance with Section 3004(j) of the Solid Waste Disposal Act.

As a result of your proposal to include penalties in the LANL FFCA, Justice has focused on this issue more closely. Discussions between DOE OGC and staff at Justice, although not resulting in a formal opinion from Justice, have led DOE to conclude that penalties are not appropriate in the LANL FFCA. This conclusion is based on the fact that the Act itself does not address, nor did Congress apparently consider in drafting the Act, that there might be a need for agreements between EPA and federal agencies during the three-year grace period between the effective date of the Act and the time that such agencies receive an order from a state requiring compliance with an agreement or an approved treatment plan as required by the Act. Because these types of agreements were not contemplated and are therefore not addressed in the Act, there is no clear and unequivocable waiver of sovereign immunity for fines and penalties to enforce such agreements, and the statutory three-year delay of the waiver for fines and penalties would remain in effect.

As I indicated in our telephone conversation, DOE is willing to discuss this issue further in a teleconference among EPA, DOE, and Justice legal staff.

On the Dispute Resolution section, DOE believes it is essential that it have the right to carry disputes to the EPA Administrator for two related reasons. The first is that Section 1-6 of Executive Order 12088 clearly dictates that the Administrator play a role in the resolution of conflicts between executive agencies.

Subsection 1-602 assigns to the EPA Administrator responsibility for resolving conflicts between executive agencies regarding violations of applicable pollution control standards. It provides further that, when the Administrator cannot resolve a conflict, "the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict." This conflict resolution scheme clearly includes disputes arising out of EPA-approved compliance plans such as that included in the FFCA and which are addressed specifically in the preceding subsection 1-601 of Section 1-6. It is DOE's view that in order to effectuate the conflict resolution scheme mandated by Executive Order 12088, we must include in the FFCA a dispute resolution process which includes a right to carry disputes to the EPA Administrator.

The second reason is that, because DOE and EPA are both agencies of the federal executive branch, DOE cannot bring suit against

EPA in the unlikely event that EPA acts in an manner that would permit a suit by a private party. Consequently, DOE must preserve those rights afforded by Executive Order 12088 to carry disputes to the EPA Administrator. In fact, it is in recognition of this situation that conflict resolution procedures are included in Executive Order 12088, and other executive orders as well, and afford the opportunity for ultimate resolution by a neutral third party.

DOE understands that EPA Region 6 is concerned that the Dispute Resolution section of the FFCA, as currently drafted, might encourage the elevation of insignificant disputes to the Administrator. Please be assured that DOE is committed to resolving disputes at the lowest level possible. If EPA wants, that intent can be stated expressly in the Dispute Resolution section.

I hope we can resolve these last two issues to both our satisfaction. DOE would like to finalize the LANL FFCA as expeditiously as possible so that we can focus our attention on compliance efforts. Many of these efforts are already underway, consistent with the current draft Compliance Plan, but I understand that we are not submitting documentation to EPA Region 6 until the FFCA is in place.

Sincerely,

Joyce Hester Laeser

Joyce Hester Laeser
Counsel

cc:
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Dan Ruge, GC-11, DOE HQ